ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

How SECURE is your IRA Planning?

The Regulatorily Induced Coma of the London Interbank Offered Rate ("LIBOR")! What now?

Traction in Client Onboarding

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About the Cover:
Miami at Night by John Neukamm

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Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments.

ARTICLES: Forward any proposed article or news of note to Jeff Baskies at jeff.baskies@katzbaskies.com. Deadlines for all submissions are as follows:

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
2	Winter	October 15
3	Spring	January 15
4	Summer	April 15

ADVERTISING: For information on advertising, please contact Jason Ellison at jellison@elattorneys.com.

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Janellen Green, at jane@emeraldgreenconsulting.com.

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

Probate And Trust Case Summaries

Prepared by Joseph M. Percopo, LL.M. Mateer & Harbert, P.A.

New probate rules have been adopted pertaining to pleadings, notices, petitions for administration, burden of proof, and settlement of minors' claims.

In re: Amendments to the Florida Probate Rules
Case No. SC19-164 – December 19, 2019

5.020 – changes the deadline for service of a motion for rehearing from 10 days to 15 days after the date of filing of the order or judgment.

5.040 – added new subdivisions: (1) allows for service by first-class mail only when in rem or quasi in rem relief is sought, and (2) removed requirement to serve registered office and replaced with "as provided in chapter 48, Florida Statutes."

5.200 – person seeking appointment as personal representative must indicate whether any other person has equal or greater preference under Fla. Stat. § 733.301 (2019), and if so the person's name and whether they will be served with formal notice. Additionally, a statement must be included by the personal representative indicating qualification to serve under Fla. Stat. §§ 733.303 & 733.304 (2019) (for people) and Fla. Stat. § 733.305 (2019) (for businesses).

5.275 – added a new subdivision which provides that where the presumption of undue influence applies, the presumption shifts the burden of proof under Fla. Stat. §§ 90.301-90.304 (2019).

5.636 – added the provision "equals or" directly preceding the phrase "exceed $50,000" pertaining to settlement for minors' claims under subdivisions (d) and (e).

A cooperative apartment cannot be considered homestead for purposes of the Florida homestead restriction on devise and descent. Due to enactment of new Cooperative Act subsequent to Florida Supreme Court precedent and a conflict between the 3rd and 2nd DCA, the court of appeals certified a question to the Florida Supreme Court regarding the application of homestead for purposes of devise and descent to a cooperative apartment.

Walters v. Agency for Health Care Administration, Fla. L. Weekly D2898a (Fla. 3d DCA 2019)

Pauline Walters, the sole heir to her mother's estate, filed a petition for summary administration and requested the court to declare the interest in a cooperative apartment ("Property") constituted protected homestead. The Property was the only sole asset of the estate. The Agency for Health Care Administration ("AHCA") filed a claim in the estate for approximately $81,000 and objected to the homestead petition, arguing that the Property was not entitled to homestead protection because it was not a "fee simple interest in land." The trial court agreed with AHCA and this appeal follows under the de novo standard of review.

The 3rd DCA acknowledges that there are 3 types of homestead: (1) provides homestead with an exemption from taxes, (2) protects homestead from forced sale, and (3) provides restrictions on the ability to alienate or devise the homestead property. Different rules apply to the application of the different homestead types. Ms. Walters argued that the rules applicable to a forced sale protection homestead (item (2) above) should apply to the Property and AHCA contended that that the rules applicable to alienation and devise (item (3) above) are appropriate for the Property. The Florida Supreme Court in *Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978) held that a cooperative apartment cannot be considered homestead property for purposes of devise and descent because it was not an interest in realty. The 3rd DCA adhered to the prior precedent, finding this to be a type (3) homestead situation and further finding that the homestead rules of devise and descent do not apply to cooperative apartments.

The 3rd DCA further notes that subsequent to Wartels, Florida enacted the Cooperative Act, Chapter 76-222, Laws of Florida. A substantially similar issue having come before this court in 2007, the Court of Appeals determined then that it was bound by Wartels but certified to the Florida Supreme Court a question as the continued applicability of Wartels after the Cooperative Act. The Florida Supreme Court initially accepted jurisdiction but later exercised its discretion and discharged jurisdiction. Prior to this case but subsequent to Wartels and the 2007 case, the 2nd DCA in Geraci v. Sunstar EMS, 93 So. 3d 384 held that the application of the rules from type (2) forced sale were applicable to a cooperative apartment and such property was exempt from forced sale even though it did not constitute a fee simple interest. Therefore, due to the passage of the Cooperative Act and two subsequent Court of Appeals cases in conflict, the 3rd DCA again certified to the Florida Supreme Court the question: "Does the Florida Supreme Court's decision in In re Estate of Wartels v. Wartels, 357 So. 2d 708 (Fla. 1978), have continuing vitality in light of the adoption

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by the Florida Legislature of the cooperative act, Chapter 76-222, Laws of Florida?"

Trial court erred in entering an order for payment of medical expenses based upon information that was not admitted into evidence at trial.

Negedly v. Smith, 2019 WL 6223115 (Fla. 5th DCA 2019)

Appellee entered into an agreement to pay the costs of rehabilitation of Gregory Smith. Following Mr. Smith's death, the rehabilitation facility sought to collect all outstanding medical expenses from Appellee. The Appellee and rehabilitation facility reached an agreement where the Appellee agreed to pay $15,000 and the rehabilitation facility assigned its claim for medical expenses to Appellee. Thereafter, the Appellee filed a creditor claim with the estate for the full amount of the medical expenses.

The trial court, after conducting an evidentiary hearing, permitted the full amount of the medial expense claim and entered an order based on the information from the rehabilitation center's billing history that was attached to Appellee's complaint. The case was appealed to the 5th DCA.

The 5th DCA found that the only evidence admitted at trial was for the $15,000 payment via testimony from Appellee, and that the billing history from the rehabilitation center had not been properly admitted into evidence. Therefore, the trial court was reversed and remanded to enter an order reducing the award of medical expenses to $15,000.

Trial Court did not error in award for accounting fees assessed against the former guardian; however, the Trial Court erred in its award of attorney fees and incarceration for failure to pay purge amount because the Trial Court failed to (1) make the necessary findings of "bad faith," (2) determine a nexus existed between the bad faith and attorney fees incurred by other party, and (3) take testimony and make findings as to the reasonable number of attorney hours and reasonable hourly rate.

Hicks v. Hicks, 44 Fla. L. Weekly D2791a (Fla. 4th DCA 2019)

Reginald Hicks ("Former Guardian") appealed an order holding him in indirect civil contempt and awarding attorney's fees and accounting fees for his failure to file a final guardianship report as previously ordered by the trial court. Several court orders were issued to Former Guardian to place assets in a restricted account, file annual plans, file annual accountings, file inventories, and complete guardian education course.

Sister of the Former Guardian filed a petition which resulted in the trial court entering an order permitting a forensic accountant to be employed and such costs to be bore by the Former Guardian. In response to Former Guardian's failure to comply with the aforementioned, the trial court removed him as guardian and directed him to file his final guardianship report. When Former Guardian again failed to comply with the trial court's order, the trial court entered additional orders for sanctions and contempt.

Sister, upon receiving the accounting report, moved for contempt to compel the final guardianship report, as well as requesting sanctions, attorney's fees, and forensic accountant fees. Thereafter, Sister properly noticed a hearing which Former Guardian failed to attend, resulting in the trial court finding indirect civil contempt, awarding attorney fees, awarding accounting fees, and directed incarceration if the Former Guardian failed to remit payment.

The standard of review on appeal was "abuse of discretion" and "substantial competent evidence" pertaining to sanctions for bad faith and award of attorney fees, respectively. The 4th DCA affirmed the award of accounting fees but reversed the award of attorney's fee because the trial court failed to make specific finds of "bad faith," failed to show a nexus between the fees and bad faith, and failed to take expert testimony or make findings as the reasonable number of hours and reasonableness of the hourly fee. In addition, the court of appeals reversed the incarceration order because the trial court failed to make findings to show the Former Guardian had the present ability to pay the purge amount. The matter of reasonable fees and the ability of the Former Guardian to pay was remanded to the trial court for further proceedings consistent with the findings of the court of appeals.

Trial Court did not error in award of attorney fees for guardianship action brought in bad faith; however, the award of a lump sum fee recovery was improper because the trial court failed to provide a breakdown of (1) the reasonable time for work performed by the attorney and paralegal and (2) which entries were duplicative or considered administrative.

Forman v. Forman, 44 Fla. L. weekly D2695a (Fla. 4th DCA 2019)

This appeal followed from a trial court's assessment of attorney fees and costs against Brenda Forman ("Wife") personally, arising out of Wife's action to determine incapacity of her estranged husband, Howard Forman ("Husband") and to appoint an emergency temporary guardian. The trial court applied Fla. Stat. § 744.331(7) (2017) to order fees based on Wife's "bad faith" with regards to Husband's capacity.

Husband's attorney initially sought in excess of $100,000 in fees that were comprised of time he and his paralegal spent working on the capacity matter. The trial court determined what was a reasonable number of hours (171.42 hours) and applied a reduced hourly fee ($350/hour) for the attorney and the billed rate for the paralegal ($125/hour) resulting in $59,997 fee assessment against Wife with an additional $1,400 for fees spent on litigating fees. In reviewing the time, the trial court determined that some of the entries were duplicative and/or constituted administrative work; however, the trial court did not provide any specific breakdown of how it reached the lump sum fee amount.

Attorney fees must be supported by substantial competent evidence and express findings as to the number of hours reasonably expended at a reasonable hourly rate; moreover, the court is not permitted to "reverse engineer" its findings based on a lump sum award. The trial court order failed to include the required findings as to the number of hours specifically expended by the attorney and paralegal and failed to specify which time entries it found duplicative or administrative.

The 4th DCA affirmed the award of fees on fees of $1,400 because it was properly within the discretion of the trial court under Fla. Stat. § 744.331 (2017). However, the court of appeals reversed and remanded to the trial court to make specific findings as to the reasonable time spent by each of the attorney and paralegal and to include which entries the trial court found to be duplicative or administrative.